

July 2004

CLINIC Pro Bono Project Update

-- CLINIC Awards First Annual Pro Bono Award to Swidler Berlin Shereff Friedman, LLP! --

On May 14th, 2004, at its annual convening in Milwaukee, WI, CLINIC recognized the outstanding pro bono work of the law firm of Swidler Berlin Shereff Friedman, LLP. Over the past year, Swidler Berlin has been the most active firm in the BIA Project, winning two-thirds of the dozen cases that it has taken on. CLINIC is grateful to Swidler Berlin for its strong support of the BIA Project and its commitment to indigent immigrants. The example below highlights the devoted approach to representation that the firm embraces.

Pro Bono Attorney Successfully Prevents Deportation of Long-Time Lawful Resident and Permanent Separation of Father and U.S. Citizen Child

Michael Lichtenstein of Swidler Berlin Shereff Friedman, LLP represented Mr. G before the BIA. Mr. G, a lawful permanent resident of the United States of 14 years, faced removal from the United States and permanent separation from his 6-year old U.S. citizen son and U.S. citizen fiancée. Mr. Lichtenstein's zealous representation and advocacy resulted not only in the release of his client from mandatory detention during the pendency of his case, but also in a rare decision from the BIA where it reversed the Immigration Judge's (IJ) finding that Mr. G had been convicted of an aggravated felony and granted him cancellation of removal, enabling him to remain legally in the United States with his family.

Mr. G was placed in removal proceedings after he received his only criminal conviction -- simple possession of methamphetamines -- for which he served 35-45 days. Mr. G had no history of drug use and this incident occurred during a particularly trying period in Mr. G's life. When he appeared pro se at his Immigration Court hearing, the IJ erroneously found that Mr. G had been convicted of an aggravated felony and ordered him removed from the United

The BIA Project is a collaborative effort of four non-governmental agencies and the Executive Office for Immigration Review. The Project is coordinated by the Catholic Legal Immigration Network, Inc. (CLINIC) and supported by the American Immigration Law Foundation (AILF), the National Immigration Project of the National Lawyers Guild (NIPNLG) and the Capital Area Immigrants' Rights (CAIR) Coalition.

States. Despite the IJ's aggravated felony finding, he heard Mr. G's testimony regarding his application for cancellation of removal - a form of relief from removal available to lawful permanent residents (LPRs) who have resided in the United States for at least 7 years, held LPR status for at least five years, and have not been convicted of an aggravated felony. At the hearing, the IJ was compelled by several factors, including Mr. G's amicable relationship with his ex-wife, his strong work history, his close relationship with his 6-year-old U.S. citizen son, and abundant evidence from witnesses that he was a responsible father and financially supported his son. Mr. G's ex-father-in-law testified about the devastating impact that Mr. G's departure from the United States would have on his young son. These factors led the IJ to rule that in the event that the BIA determined his aggravated felony finding to be incorrect, he would have granted Mr. G cancellation of removal.

After the IJ issued his decision ordering removal, Mr. G filed an appeal and his case became part of the CLINIC BIA Pro Bono Project. At this time pro bono attorney Michael Lichtenstein took on Mr. G's case.

When Michael became involved in Mr. G's case, Mr. G was subject to mandatory detention under Immigration and Nationality Act (INA). This provision of the INA, passed by Congress in 1996, amended U.S. immigration law to require the detention of almost all non-citizens with criminal convictions. There is no exception to mandatory detention that permits release for medical reasons.

Mr. G is diabetic and completely insulin dependent. Prior to his detention, in order to regulate his blood sugar, Mr. G used an insulin kit to check his blood sugar at least eight times per day, and ate approximately eight small meals per day. In detention, Mr. G only had access to his insulin kit four times per day and only received four meals per day. A nurse at the detention facility sent a letter to Mr. G's attorney stating that in detention, Mr. G's blood sugar levels were fluctuating between extremely high and dangerously low levels every day. Her letter noted that, "It is the large infrequent meals such as those served in jails that challenge the glucose-metabolizing systems and often precipitate these rapid descents and ascents of blood glucose. It is nearly impossible for staff to monitor and accommodate [Mr. G's] rapid blood sugar changes in a medically appropriate manner, however much we try..."

Armed with the nurse's letter, Michael made many phone calls to detention officials, and after intense advocacy, secured Mr. G's release. On appeal to the BIA, Michael argued that Mr. G's criminal conviction was not an aggravated felony, and that Mr. G was therefore entitled to a grant of

What attorneys are saying about the BIA Pro Bono Project:

"CLINIC's BIA Pro Bono Project has been a wonderful help to our firm in opening up to our attorneys pro bono opportunities in a very rewarding area. We know that the greatest weakness in our immigration system is the appalling lack of sufficient legal assistance for aliens caught up in that system. Many attorneys who would like to help, however, do not feel able or qualified to do so in an unfamiliar area of the law. CLINIC screens cases, provides forms and training and makes available practical assistance that has allowed us to mobilize and empower willing attorneys with a variety of skills and backgrounds to provide valuable assistance to people caught up in often difficult and heart-rending immigration problems. We are proud of the work we have been able to do for a number of worthy clients, and gratified ourselves at the assistance from CLINIC that made this work possible."

-John Clark, Of Counsel, Perkins Coie LLP

cancellation of removal. In April 2004, the BIA issued a decision agreeing with these arguments. It reversed the IJ's aggravated felony finding and granted cancellation of removal.

Ever grateful to Michael for his assistance, Mr. G's U.S. citizen fiancée notes, "Without Michael, [Mr. G] would be deported and wouldn't have the chance to have a relationship with his son. Michael has made such an impact on our lives by helping us. Words can never say how much he's meant to our family - I don't know what we'd do without him. He's a very kind man who is genuine and who gave us a lot of hope for our lives and our future."

"The BIA Pro Bono Project serves a very real need by screening cases of unrepresented foreign nationals and matching them with volunteer pro bono attorneys nationwide. I have represented several clients through this program, all of whom were being detained for long periods of time (typically a year or more) while their cases remained pending. Without the service provided by the BIA Pro Bono Project, I and other participating attorneys would have no way of identifying non-frivolous appeals and cases where relief is even possible, and many, many foreign nationals who are in fact eligible for such relief would end up deported and disserved in complete contradiction to the American ideal of liberty and justice for all. The BIA Pro Bono Program helps to make our dearly held principle of due process under law a reality."

-- Ron Wada, Attorney at Law, Berry, Appleman & Leiden LLP

After Two Government Appeals, National of Haiti Retains CAT Relief!!

Mr. S, a national of Haiti who came to the United States as an unaccompanied minor, was granted protection under the Convention Against Torture (CAT) by the Immigration Judge (IJ). Mr. S fled Haiti after his father and two brothers perished in a fire at their home, which was set in retribution for Mr. S' father's activities as a Ton-Ton Macoute. Mr. S has no relatives remaining in Haiti that he is aware of.

The IJ found Mr. S credible and distinguished his case from Matter of J-E- finding that if returned to Haiti, Mr. S, who takes medication to control his schizophrenia, would be imprisoned without medical care. The IJ found that his maltreatment and lack of much needed medication would amount to torture under the regulations. The government appealed, and Candida Quinn, a private practitioner in Helena, Montana, represented Mr. S on appeal. The BIA ultimately remanded Mr. S' case back to the IJ, noting that because Mr. S had not been represented before the Immigration Court, the record provided little in the way of specific information as to how Haitian officials might respond to a person with Mr. S' medical problems. The BIA remanded the case to the IJ to develop a more complete record and for the IJ to determine, the likely reaction of Haitian prison officials to a mentally ill person such as Mr. S. Ian Bratlie, an attorney with the Pennsylvania Immigrant Resource Center, represented Mr. S before the IJ. The IJ granted CAT relief again, and the government appealed again. Mr. Bratlie represented Mr. S on appeal, and the BIA ultimately dismissed the government's appeal, enabling Mr. S to stay in the United States with CAT protection.

BIA Upholds CAT Protection for National of Laos!!

Under the supervision and instruction of Steven Yale-Loehr and Estelle McKee at Cornell Law School's Asylum and Convention Against Torture Appellate Clinic, students Victoria Hadfield and Evan Fan, represented a national of Laos before the BIA. Mr. Y had been granted protection under the CAT by the IJ, who found that his ethnic Hmong background, political beliefs, and political activities in the United States, and the recent arrests, torture, and execution of his family members due to their past political affiliation, made it likely that he would be tortured in Laos. As a result of the excellent brief submitted by the Cornell law school clinic, the DHS appeal was dismissed, Mr. Y was released from detention, and he remains in the United States with CAT protection.

BIA Upholds CAT Grant to National of Nigeria!!

David Lubitz and L. Misha Preheim of Swidler Berlin Shereff Friedman, LLP represented Ms. A, a lawful permanent resident from Nigeria, before the BIA. The Immigration Judge granted Ms. A protection under the Convention Against Torture (CAT). The IJ's finding was based on the fact that Ms. A has a severe mental illness, and would not be able to obtain the treatment necessary to control her illness in Nigeria. The IJ found that the lack of medical care in Nigeria would cause her to relapse, and resume stealing (a habit she had controlled with medication available in the United States). The IJ found that such behavior would likely result in a "hadd" sentence under Shar'ia law, such as amputation. Among other factors, the IJ and BIA also recognized the well-documented and reported fact that in Nigeria, there exists a deep-seated and long-standing cultural practice in which men rape mentally ill women to gain wealth, and that the government acquiesces to this practice. The BIA dismissed the DHS' appeal in this case and after much advocacy on the part of Swidler Berlin, Ms. A was released from detention.

"Having practiced deportation defense for almost 20 years, one of my greatest frustrations is that there is no "public defender" system in place for indigent aliens in proceedings in immigration court and on appeal. The demand for representation far outstrips the supply. This program and others like it make small but necessary inroads, steadily chipping away at the seemingly endless representation "iceberg." I encourage EOIR to reach out to the ABA and state and federal bar associations, urging them to ask their members to participate."

--Daniel M. Kowalski,
Editor-in-Chief, *Bender's
Immigration Bulletin*

LPR Granted Cancellation of Removal!!

The government charged Mr. G, a lawful permanent resident of the United States of more than 25 years with deportability for having been convicted of 2 crimes involving moral turpitude. At Mr. G's initial Immigration Court hearing, the IJ terminated proceedings, finding that the DHS did not provide conviction documents sufficient to sustain the deportability charge. The IJ did not reach the issue of whether or not Mr. G's crimes were actually crimes of moral turpitude. DHS appealed the IJ's decision and Mr. G was represented before the BIA by Anayancy Housman. The BIA sustained the DHS appeal, finding that the documents submitted by the DHS were sufficient to establish Mr. G's convictions, but remanded to the IJ to determine whether Mr. G's convictions supported the removal charge and consider any forms of relief for which he was eligible. Anthony Keber of Iandoli & Associates, PC, represented Mr. G in Immigration Court. As a result of Anthony's great work, the IJ granted Mr. G

cancellation of removal, allowing him to remain in the United States with his family. The government did not appeal this ruling.

“I can think of no other type of legal representation that is as direct, crucial or personal as that between an attorney and a client who, in many cases, is in grave fear of returning home. As an American, I don’t believe I will ever truly be able to grasp the tragedy that must come when “home” is not “sweet” but is, instead, the place one fears the most. I often hope I am able to convey to my clients through this program the very values that they must have believed were abundant in the United States when they first chose to come here. No doubt, for many of them, America has not proven to be the “land of the free” they expected.

“The CLINIC program is a valuable resource for those who either want to discover or re-discover the great rewards in representing an individual who is truly in need.”

*--Marc M. Harrold, Esq.,
BIA Project Participant*

Post-Conviction Relief Results in 2nd Chance for Long-Time LPR!!

Mr. M, a lawful permanent resident (LPR) from Trinidad and Tobago, was represented by Vikram Badrinath, (Vikram Badrinath PC) and Benjamin Spencer (Shearman & Sterling LLP). Mr. M entered the United States as an LPR at the age of nine. After receiving a conviction for assault (which was later vacated), the government placed him in removal proceedings as an aggravated felon. In proceedings, Mr. M argued that he had derived U.S. citizenship through his mother. The BIA upheld the IJ’s decision, and Benjamin Spencer at Shearman & Sterling filed a petition for review in the Third Circuit to challenge the BIA’s finding that Mr. M had not derived U.S. citizenship. However, during the pendency of this petition, Mr. M’s assault conviction was vacated. Vikram Badrinath filed a motion to reopen his case before the BIA, requesting that proceedings against Mr. M be terminated due to his post-conviction relief. The motion was granted, and Mr. M retains his LPR status.

BIA Denies DHS Attempt to Submit “New Evidence”

Jill Sheldon, an attorney in CLINIC’s Miami office, represented Mr. R, a lawful permanent resident from Mexico before the BIA. The IJ had terminated proceedings against Mr. R, finding that his aggravated DUI conviction was not a crime involving moral turpitude. The IJ, following clear 9th Circuit precedent, held that the aggravated DUI statute was divisible, and that the government could not use a pre-sentence report to establish removability. The government offered no other evidence to

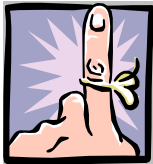
establish removability, but appealed the IJ’s decision. After the BIA dismissed the government’s appeal, the DHS filed a motion to reconsider and reopen before the BIA, arguing that the Ninth Circuit’s most recent decision to deny rehearing in *Hernandez-Martinez v. Ashcroft*, in which the Ninth Circuit again reiterated that pre-sentence reports cannot be used to establish removability, constituted a change in the law subsequent to Mr. R’s removal hearing.

In its motion, the government argued that the case should be reopened to allow for the introduction of a transcript of the plea hearing, one of the documents that the 9th Circuit accepts to establish removability. The DHS argued that the transcript was not available at the time of Mr. R’s Immigration Court hearing “because it was not a document that was typically presented by the Department to sustain a charge of removability” and that at the time of the hearing, Ninth Circuit

case law did not preclude the use of a pre-sentence report to establish removability. The BIA flatly rejected this argument and denied the motion, pointing to decisions from the Ninth Circuit (issued prior to Mr. R's hearing) that precluded the use of pre-sentence reports to establish removability.

Termination of Proceedings Upheld by BIA!!

Laura Ford of Swidler Berlin Shereff Friedman, LLP represented Mr. T under the BIA Project. The Immigration Judge had terminated Mr. T's proceedings, finding that the DHS has failed to prove that his criminal convictions made him removable. The DHS appealed the IJ's ruling. The BIA dismissed the DHS appeal finding that Mr. T's convictions for leaving the scene of an accident (in violation of the California Vehicle Code) and burglary of a vehicle (in violation of the California Penal Code) did not constitute crimes of violence, and therefore were not aggravated felonies. The DHS subsequently filed a motion to reconsider, which the BIA also denied.



REMINDER TO PROJECT PARTICIPANTS:

If you have received a decision on a BIA Project case and have not forwarded it to CLINIC, please do! Also, please forward a redacted version of your brief once it has been filed. Model briefs are extremely helpful to Project participants with limited BIA practice.

“Thank you for representing me through Dear Katie Cunningham and Dear Julie Tappendorf in Chicago. At the time I received for FedEx, I had almost given up on the United States for I could not afford a lawyer, though I was telling the truth about my experiences of abuse...all over Nigeria. You gave me hope and from the brief my lawyers filed, I will win my case. I take them very personal like my two sisters for though I don't know them, I'm in awe of them for several reasons. They are top-notch lawyers with the Supreme Court of Chicago, the best money can buy. I got for free, dropped in my lap like a gift from heaven... Thank you and God bless.”

--Detainee Represented through the BIA Project, referring to her attorneys from the law firm of Holland & Knight, LLP

Please share information about the BIA Project with colleagues who might be interested in participating. We need more volunteers to take on cases! Volunteers should contact Molly McKenna at CLINIC at (202) 635-2567 or mmckenna@cliniclegal.org.